




**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
WASHINGTON, D.C. 20460

OCT 30 1992

**MEMORANDUM**

OFFICE OF  
WATER

**SUBJECT:** Approval of 303(d) Lists, Promulgation Schedules/Procedures, Public Participation

**FROM:** Geoffrey Grubbs, Director   
Assessment and Watershed Protection Division

**TO:** Water Quality Branch Chiefs  
Regions I-X

This memorandum addresses the following subjects: A) effective date of the regulation; B) approval/disapproval of Section 303(d) lists; C) EPA promulgation procedures if a State fails to submit an approvable 303(d) submission; D) public participation requirements for 1992 submissions; and E) public participation requirements for 1994 303(d) submissions. The guidance outlined below is based on our earlier teleconferences and has been coordinated with Roland Dubois of the Office of General Counsel. It is a guidance only - decisions in any particular case will be made by applying the Clean Water Act and implementing regulations.

This guidance has been developed closely with the Regional TMDL Coordinators. It provides more detailed procedural guidance than is customary. Because of active litigation pertaining to the 303(d) program, we believe this level of detail is necessary.

**A. Effective Date Of The Regulation**

The regulation became effective on August 24, 1992. Lists submitted after the effective date should be reviewed in accordance with the new rules; lists submitted prior to the effective date should be reviewed in accordance with the old rules. The principal difference between the old and new rules regarding content of the lists is the requirement in the new rule for States to identify waters targeted for TMDL development in the next two years.

Under the new rule, the deadline for the State biennial submission under section 303(d) in accordance with 40 CFR 130.7(d)(1) is October 22, 1992.

Please refer to 40 CFR Section 130.7, the April 1991 Guidance and the August 1992 Supplemental Guidance regarding required content of State lists. Approval/disapproval applies to the waterbodies on the list, a priority ranking, identification of pollutants, and for lists subject to the new rules, a targeted list of TMDLs to be initiated during the next two-year period. Lists that do not contain these elements are not approvable.

## **B. Approval/Disapproval**

As discussed in the August 13, 1992 Supplemental Guidance and as supplemented by this guidance, Regions have at least four possible approval/disapproval options. These options, as described below, are: 1) approve; 2) disapprove; 3) conditionally approve; and 4) partially approve/partially disapprove. Each of these options may be appropriate in certain circumstances. A partial approval/partial disapproval means, for example, that the State list of waters is approved in part and disapproved in part. In this case, EPA would then establish an appropriate amendment to the approved list that would rectify the problems that led to the partial disapproval.

Section 303(d) requires that the Administrator approve or disapprove section 303(d) lists. Nationally, this authority has been formally delegated to the Regional Administrators with redelegation potential to Water Management Division Directors. Therefore all actions regarding approval/disapproval of section 303(d) lists must be signed by the Regional Administrator unless there has been formal redelegation in the Region to the Water Management Division Director. Redelelegation of Section 303(d) approval/disapproval decisions to a level lower than the Water Management Division Director is not authorized.

Since legal defense of EPA's action regarding Section 303(d) submissions will be based on the administrative records (including decision documents) for the final actions, we strongly recommend that Regions clearly articulate and document the basis for their actions.

### **1. Approval**

Approval of the State submission should be accomplished by a letter of approval within 30 days of receipt of the list.

### **2. Disapproval**

Disapproval of the entire list submitted by the State means that EPA will promulgate a list for the State. EPA should send a letter of disapproval to the State within 30 days from the date of receiving the State submission. EPA

encourages States and Regions to work together and does not anticipate many disapprovals of an entire State list. Disapprovals of the entire State list should be made only when it is clear that the State and Region are unable to agree on any part of the 303(d) list.

### 3. Conditional Approval

For conditional approvals, the following is a recommended sequence and timeframe for State/EPA actions:

- o EPA informs the State of its decision to conditionally approve the State submittal in a letter of conditional approval no later than 30 days from EPA's receipt of the State submittal. Conditional approval letters must also include a condition that the State respond to the conditional approval letter by a specified date, typically within 30 to 60 days. In some cases, States may need up to 60 days or more to respond to EPA's conditions, especially where changes to the State list are sufficiently significant to warrant another round of public comment prior to resubmission to EPA.

- o If the State does not respond by the date specified in EPA's conditional approval letter, EPA informs the State by letter as soon as practicable (but no later than 30 days after the deadline for State response) that the State has failed to satisfy one of the conditions of the conditional approval (response by the designated date) and, therefore, that the conditional approval is void. In the same letter EPA either disapproves or partially disapproves the original State submission.

- o If the State responds to EPA's conditional approval by the designated response date, EPA must evaluate the response to determine whether it satisfies the conditions stipulated, and whether the State submission may now be approved. EPA should complete this evaluation within 30 days. EPA should reply by letter to the State that the conditions are satisfied and that list is fully approved, or that the conditions are not satisfied and that the list is either disapproved or partially disapproved (see number 4 below).

- o The following is an example of how to word a conditional approval.

"EPA conditionally approves the [State] 303(d) list. The conditions are that:

- the State provide adequate justification to EPA for not including [named waters] on the list,

- the State provide adequate justification to EPA for not including all waters on the section 303(d) list that were identified by the State in its last Section 305(b) report as not meeting all designated uses,
- the state provide a revised submission that includes [named waters] on the list,
- the State amends its list to include a priority ranking of waters for TMDL development, and
- the State satisfy all of the above conditions by [a date specified by the Region].

Failure to satisfy any of these conditions will render EPA's conditional approval void, and will lead to a new EPA approval/disapproval decision."

The last condition and the sentence that follows it should be included in all EPA conditional approvals.

As described in the August 13 Guidance, conditional approvals are typically appropriate only for minor deficiencies in State submissions. However, if the Region believes that there are policy or programmatic justifications for engaging the States in remedying more significant defects as opposed to EPA stepping in to promulgate, and if the Region provides a limited time period (e.g. 60 days) for the States to address these deficiencies before the conditional approval is rendered void, then we believe there may be situations where conditional approvals would be appropriate notwithstanding the presence of non-minor deficiencies.

#### 4. Partial Approval/Partial Disapproval

For partial approvals/partial disapprovals, the following is a recommended sequence and timeframe for EPA actions:

- o EPA should partially approve/partially disapprove State submissions within 30 days of their receipt. EPA should propose for public comment a supplement to the partially approved State list within 30 days of the partial approval/partial disapproval in accordance with 40 CFR § 130.7(d). The proposal should be published in the Federal Register or in State newspapers. EPA should revise its proposed list as appropriate in light of the public comments, prepare a response-to-comments document, transmit the listing to the State for incorporation in the State's water quality management plan,

and inform individuals who commented on the EPA proposal of EPA's final action.

### **C. Process for EPA Promulgation**

If a State fails to submit a section 303(d) list by October 22, 1992, Regional Coordinators should call Don Brady, Chief, Watershed Management Section, AWPDP, to discuss the appropriate EPA response. Headquarters will recommend a vigorous response to State inaction in most circumstances. One possible exception may be where a State has submitted a letter explaining why they could not meet the October 22 deadline and proposed a rapid schedule for submission of the list. Headquarters and OGC should review proposed schedules and consult with the Region before any date for submittal of the list after October 22, 1992 is agreed to by the Region.

The 1992 submission is the keystone to enhanced implementation of section 303(d). If EPA promulgations are deemed appropriate, we want to be sure that they are accomplished quickly, consistently, and with appropriate sensitivity. Therefore, I propose that EPA promulgations be handled by a "team" approach in which Headquarters, the Regions [program and counsel] and OGC work together to accomplish needed promulgations.

### **D. Public Participation -- 1992**

As described in the August 13 Supplemental Guidance and in the Response to Comments Document accompanying the July 24 amendments to the Part 130 regulations, EPA regulations require States to provide an opportunity for public participation in development of Section 303(d) lists and TMDLs. A number of Regions have requested guidance on procedures to follow where States have not provided an opportunity for public participation in development of the 1992 Section 303(d) lists. Although a number of options are available, we recommend one of the following:

- o If the Section 303(d) list is virtually identical to the State's Section 304(l) long list or the 1992 Section 305(b) list of impaired waters, and the State provided an opportunity for public comment on the identical list, EPA may deem the public participation requirement in EPA regulations satisfied with respect to the 1992 Section 303(d) list. Although this approach is less than ideal it is acceptable in this instance because: 1) the 304(l) long list and the 1992 Section 305(b) list were prepared in the very recent past, and are substantively very similar to the Section 303(d) list; 2) full public participation will be

required when the State submits the updated section 303(d) list on or before April 1, 1994.

- o EPA can offer an opportunity for public comment on the State list in the context of its approval/ disapproval decision. If EPA disapproves the State list, EPA will afford an opportunity for public comment with respect to EPA's proposed replacement pursuant to 40 CFR § 130.7. No additional public participation is necessary.

However, if EPA expects to approve or partially approve the State list, the Region should publish a public notice including, as appropriate, the State list, a description of the Region's anticipated approval action, and a time period and address for submission of public comments. This could be published in either the Federal Register or in State newspapers. EPA should then consider comments received to revise its proposed action, prepare a response to comment document, and then make a final decision on the State list.

- o EPA may request that the State withdraw its list submission, provide an opportunity for public comment on the list and then resubmit the State list after considering comments received. Although this may result in final State submissions after October 22, 1992, we believe that deviation from the October 22 deadline is warranted where necessary to afford the public an opportunity to comment on the State list.

- o EPA may conditionally approve a State list conditioned on the State providing an opportunity for public comment on the list and submitting to EPA by a specified date a document providing reasonable responses to all public comments. After review of the State responses to comments, EPA would notify the State that the conditions are either satisfied and the list is fully approved, or not satisfied and the list is disapproved or partially disapproved.

#### **E. Public Participation -- 1994**

Beginning in 1994, and biennially thereafter, the first option described above will not be available. Accordingly, Section 303(d) lists must have full public participation, and this should be provided by the States as they develop the State lists. The minimum requirements will be: 1) a public notice issued by the State soliciting comments on a proposed list or announcing availability of a public hearing for the presentation of oral comments on a proposed State list; and 2) State preparation, and submission to EPA along with a final list, of a responsiveness

summary in accordance with 40 CFR Section 25.8. Public participation requirements are explained in greater detail in 40 CFR Part 25. These regulations should be consulted as the 1994 list is being developed. States may wish to conserve resources by combining public notices, hearings, etc. with those for other programs such as NPDES permits and Section 305(b) reports. However, where this is done, the public notice should clearly specify that comment on a proposed Section 303(d) list is being solicited in addition to comment on other proposed actions.

I hope this memo clears up these issues. If you have any questions about this memo please call me or Bruce Newton, Chief, Watershed Branch at [202-260-7076].

cc. Dave Davis  
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Regional TMDL Coordinators  
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